SUPREME COURT, U. S.
OCT 23 1974
MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

DOCKET NO. 74-486

STATE OF NEW JERSEY,

Petitioner,

-vs-

DAVID SHEFFIELD and CHESLEY HOLMES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

DOCKET NO.

STATE OF NEW JERSEY,

Petitioner,

-vs-

DAVID SHEFFIELD and CHESLEY HOLMES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Petitioner prays that a writ of certiorari issue to review a judgment of the Superior Court of New Jersey, Appellate Division, which reversed an order of the Superior Court of New Jersey, Law Division, denying a motion to suppress evidence.

OPINIONS BELOW

The unreported opinion of the Superior Court of New Jersey, Appellate Division, as well as the judgment of the Supreme Court of New Jersey denying certification, appear in the Appendix hereto (Appendix B and Appendix A, respectively). The date of the Supreme Court of New Jersey's judgment is July 22, 1974.

JURISDICTION

In the early morning hours of September 15, 1971, defendants were arrested separately in the Howard Johnson Motor Lodge in Newark, New Jersey.

The Essex County Grand Jury returned four indictments: Indictment No. 284-71, charged defendant Sheffield with possession of a firearm contrary to the provisions of *N.J.S.* 2A:151-41; Indictment No. 258-71, and No. 259-71 charged defendant Holmes respectively with possession of a firearm contrary to the provisions of *N.J.S.* 2A:151-41 and with possession of a controlled dangerous substance contrary to *N.J.S.* 24:21-20; Indictment No. 3678-71 charged both defendants and one, Laurleet Sanders, with conspiracy to violate the narcotic laws, contrary to *N.J.S.* 24:21-24.[1] On November 12, 1971, defendants filed motions to suppress evidence seized. On December 4, 1972, all four indictments were consolidated for trial, and motions to suppress evidence were heard before the Honorable Ralph L. Fusco, J.S.C. After hearing testimony on the issue of standing, Judge Fusco denied the motions on the ground that defendants lacked standing to challenge the legality of the searches and seizures. The trial then commenced before Judge Fusco and a jury, and on December 7, 1972, the jury found defendants guilty on all counts.

On February 2, 1973, Judge Fusco sentenced defendant Sheffield to a term of not less than two nor more than three years in the New Jersey State Prison and to a fine of $1,000 on Indictment No. 284-71. Defendant Sheffield's conviction on the conspiracy charge (Indictment No. 3678-71) was set aside as against the weight of the evidence and a new trial was granted thereon. Defendant Holmes was sentenced to not less than three nor more than five years in the New Jersey State Prison and to a fine of $1,000 on Indictment No. 3678-71 (conspiracy); not less than three nor more than five years in the New Jersey State Prison and a $5,000 fine on Indictment No. 259-71 (possession of narcotics), to run concurrently to the sentence on Indictment No. 3678-71; not less than two nor more than three years in the New Jersey State Prison and a $1,000 fine on Indictment No. 258-71 (possession of firearm), to run consecutively to the sentences on Nos.

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1 Indictments No. 258-71, 259-71 and 284-71 were returned on September 30, 1971. Indictment No. 3678-71, charging the defendants with conspiracy, was returned on May 1, 1972.

3678-71 and 259-71.

On February 5 and 9, 1973, defendants filed timely Notices of Appeal to the Superior Court, Appellate Division. On March 25, 1974, in an unreported *per curiam* opinion (Appendix the Appellate Division remanded the case to the trial division for a hearing of defendants' motions to suppress evidence, stating: "If the motion is granted, the conviction is reversed and a new trial ordered. If it is denied, the conviction will be affirmed. We do not retain jurisdiction."

On April 10, 1974, the State filed a timely Notice of Petition for Certification in the Supreme Court of New Jersey. The Petition was denied by the Supreme Court of New Jersey on July 22, 1974 (Appendix A). This Petition for a Writ of Certiorari under 28 *U.S.C.* § 1257(3) followed.

QUESTIONS PRESENTED

1. Should the "automatic" standing rule of *Jones v. United States*, 362 *U.S.* 257 (1960) be reconsidered in light of this Court's subsequent holding *Simmons v. United States*, 390 *U.S.* 377 (1968) and in light of *Brown v. United States*, 411 *U.S.* 223 (1973)?

2. Does a defendant charged with an offense, an essential element of which is possession of the seized evidence at the time of the seizure, have "automatic" standing to challenge the legality of the search and seizure without alleging or establishing either:

(a) defendant's legitimate presence at the time of the contested search and seizure; or

(b) a proprietary or possessory interest in the premises searched; or

(c) a proprietary or possessory interest in the evidence seized?

3. Does a defendant who is charged with an offense, an essential element of which is possession of the seized evidence at the time of the seizure, have standing to challenge the legality of the search and seizure where:

(a) defendant alleges no proprietary or possessory interest in the evidence seized;

(b) defendant can establish no legitimate proprietary or possessory interest in the premises searched;

(c) defendant's presence on the premises at the time of the search is not legitimate?

STATUTES INVOLVED

See Appendix D.

STATEMENT OF THE CASE

This is an application for a writ of certiorari to review a judgment of the Superior Court of New Jersey, Appellate Division, which reversed an order of the Superior Court of New Jersey, Law Division, denying a motion to suppress evidence on the question of standing.

The following constitutes a brief synopsis of the relevant testimony taken at the motion to suppress evidence and at the trial in the Superior Court of New Jersey, Law Division.

A. The First Search And Seizure

On September 15, 1971, at approximately 1:15 A.M., Newark Police Officer David Semplenski and his partner responded to a call from the Howard Johnson Motor Lodge on Route 1, Newark, concerning a man seen carrying a gun. After speaking to the manager and a female employee, the police officers accompanied the manager to Room 354. They knocked and identified themselves as police officers. Defendant Sheffield opened the door. (1T93-16 to 1T95-16). Upon entering the room, Officer Semplenski observed a gun lying under a table. The occupants of the room, defendant Sheffield and one Elizabeth Cantrell, were placed under arrest (1T99-1 to 5).

B. The Second Search And Seizure

Between 3 and 4 A.M. on September 15, 1971, Newark Police Officer Joseph Fenton and his partner responded to a call from the Howard Johnson Motor Lodge concerning a man in possession of a gun in Room 265 (2T8-5 to 24). They proceeded to the room in the company of a night doorman. Fenton and his partner knocked on the door of that room which was opened by defendant Holmes (2T9-18 to 2T10-10). As the door was opened, Fenton observed from the hallway a gun on the dressing table and a woman in bed later identified as Loreelet Sanders (2T10-12 to 13). Holmes was arrested and a search of the room was made revealing a paper bag containing $8,862 in cash (2T16-2 to 14). At the direction of the police, the manager double locked rooms 265

and 354 with the grand master key (2T26-3 to 18).

C. The Third Search And Seizure

The manager first reopened the door to Room 265 when Newark Police Detective Anthony Rosamilia and other police officers arrived at approximately 11:15 A.M. on the same day (1T72-8 to 20; 2T27-20 to 2T28-8). At that time and place a search was conducted and a bag containing 83 grams of heroin was discovered under a bathroom wastebasket (1T81-17 to 24). Defendant Holmes was then in the custody of the police and was not present when this search was made.

D. Testimony At The Motion To Suppress Evidence

Defendant David Sheffield testified at the hearing on the motion to suppress that he was president of the Stone Lady Record Company (1T12-5). On September 14, 1971, he sent an "agent" named John Bryant (1T16-29) to rent a room at the Howard Johnson Motor Lodge (1T11-22). Defendant Sheffield gave Bryant $25 for the price of the room (1T14-16). He testified that he sent Bryant to the room in "... the early part of the afternoon." (1T15-5; 1T18-1). Defendant Sheffield stated that he sent Bryant to rent the room because defendant was busy with other matters. Defendant Sheffield testified that he was going to use the room to talk with Betty Kittrell (1T12-12). He stated that he arrived at the room at about 9:00 or 9:30 P.M. on September 14, 1971. He did not sign the desk register (1T14-11). He stated the room was registered in the name of John Bryant (1T16-29). Bryant told defendant Sheffield what room to go to by telephone (1T16-29). Bryant was in the room when defendant Sheffield arrived at the motel, gave defendant Sheffield the key to the room (1T20-21), and then left about 15 minutes later (1T15-2). Defendant Sheffield did not see Bryant again that night (1T20-21).

Sheffield stated that Betty Kittrell was also in the room when he arrived (1T29-24). Betty Kittrell made a number of telephone calls (1T21-14). Defendant Sheffield stated that he imagined Bryant paid for the telephone bill. He stated, "It must have went on his bill because he never came back." (1T21-23). He further testified that the meeting with Betty Kittrell was prearranged (1T31-12).

Sheffield stated that while he was in the room with Betty Kittrell, the police knocked on the door (1T13-4). The police came in with a man who had a key and searched the room. A policeman

said, "Here's a gun." (1T13-12). Defendant Sheffield was arrested for possession of the gun (1T13-12).

Defendant Sheffield testified that he had lost track of his "agent," Bryant. He last saw him about seven months before trial going to the movies (1T20-5). He claims he talked to Bryant about records and did not mention the motel room incident (1T20-15).

Defendant Chesley Holmes testified that he was vice-president of the Stone Lady Record Co. (1T34-11). Defendant Holmes stated that a motel room was rented because he "had a contract that [he] had to have signed for prospective clients [he] was going to try to solicit." (1T35-22). Defendant Holmes stated that he met his clients in motel rooms (1T35-25). He did not know the number of the room he occupied on the evening of September 14 and the morning of September 15, 1971 (1T38-1). He stated that a Mr. Anthony Johnson, a sales employee of Stone Lady Records, rented the room for him (1T38-5). He did not know when Johnson rented the room (1T38-20). Defendant Holmes indicated that he occupied the room about 10:00 or 10:30 P.M. on September 14 (1T39-2). He occupied the room with Loreelet Sanders, "a prospective client for a contract with a record company." (1T36-6 to 8). At some point there was a loud rapping at the door. Defendant Holmes asked who was there and someone gave a "fictitious" name. He heard scuffling. He did not remember if the door was broken down or a pass key was used. A half dozen police officers came in and searched the rooms (1T36-12 to 19). Defendant Holmes was charged with possession of a weapon and taken to jail (1T36-21 to 25). "Anthony Johnson" was not present in the room when the police came in (1T38-22). Defendant Holmes stated that he had lost contact with Johnson. He had last seen him about a year before trial (1T38-14).

Following this testimony, the State moved to dismiss the motions to suppress on the ground that defendants had not established a sufficient interest in the premises searched or in the contraband seized to have suffered an invasion of their privacy. The trial court agreed and held that defendants had not established that they had standing to complain of any alleged Fourth Amendment violation (1T49-25 to 1T51-2).

In a *per curiam* opinion, the Appellate Division reversed the trial court's ruling and held that defendants were "legitimately" in the motel rooms when they were searched and thus had standing to proceed with the motion to suppress. The Appellate Divi-

sion's ruling was made in the face of the uncontroverted testimony that neither defendant was present at the time of the third search which uncovered the narcotics. The case was remanded to the trial court for a hearing on the motion to suppress with the instruction that, "if the motion is granted the conviction is reversed and a new trial ordered. If it is denied, the conviction will be affirmed. We do not retain jurisdiction."

The Supreme Court of New Jersey subsequently denied the State's Petition for Certification. This application follows.

REASONS FOR GRANTING THE WRIT

POINT I

Defendants Lack Standing To Challenge The Legality Of The Search And Seizure Of The Narcotics In Light Of This Court's Statements In *Brown v. United States*, 411 *U.S.* 223, 93 *S.Ct.* 1565, 36 *L.Ed.* 2d 208 (1973, Concerning The Effect Of *Simmons v. United States*, 390 *U.S.* 377, 88 *S.Ct.* 967, 19 *L.Ed.* 2d 1247 (1968), Upon The "Automatic" Standing Rule In *Jones v. United States*, 362 *U.S.* 257, 80 *S.Ct.* 725, 4 *L.Ed.* 2d 697 (1960).

The instant case squarely presents the standing question expressly reserved in *Brown v. United States, supra*, 411 *U.S.* at 228,229, for a case where possession of seized evidence at the time of the contested search and seizure is an essential element of the offense charged. This Court there noted:

> But it is not necessary for us now to determine whether our decision in *Simmons, supra*, makes *Jones'* "automatic" standing unnecessary. We reserve that question for a case where possession at the time of the contested search and seizure is "an essential element of the offense...charged."
>
> * * *
>
> Again, we do not decide that this vice of prosecutorial self-contradiction warrants the continued survival of Jones' "automatic" standing now that our decision in Simmons has removed the danger of coerced self-incrimination. We simply see not reason to afford such "automatic" standing where, as here, there was no risk to a defendant either of self--

incrimination or prosecutorial self-contradiction.

In *Jones v. United States, supra,* this Court relaxed the requirements for standing to challenge the legality of a search and seizure in cases where possession of the seized items at the time of the contested search and seizure is a necessary element of the crime charged. This Court there acknowledged that one must be a victim of an invasion of privacy to challenge the legality of a search.

> In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search and seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else... *Id.* 362 U.S. at 261.

Further, the movant has the burden of establishing that he was the victim.

> *Ordinarily*, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy. . . . *Id.*, 362 U.S. at 261. (Emphasis added).

However, this Court recognized in *Jones* the special problem presented in prosecutions where the defendant is charged with a crime which has as a necessary element possession of the items seized at the time of the contested search and seizure. Since these "possessory" crimes may be established through proof solely of possession of the items in question, a defendant seeking to comply with the conventional standing requirement would have to allege facts which would tend to prove his own guilt of the charge. In order to resolve the dilemma of such a defendant, and in order to prevent the government from having the advantage of contradictory positions as a basis for conviction, this Court formulated the "automatic" standing rule for such cases:

> The same element in this prosecution which has caused a dilemma, i.e., that possession both convicts and confers standing, eliminates any necessity for a

> preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged.

Jones v. United States, supra, 362 *U.S.* at 263.

Eight years after the *Jones* case this Court was confronted in *Simmons v. United States,* 390 *U.S.* 377, 394 (1968), with a somewhat similar standing problem in the context of a prosecution for the "non-possessory" crime of armed robbery. However, in *Simmons* defendant Garrett could not avail himself of the "automatic" standing rule of *Jones* because he had not been charged with a crime a necessary element of which was possession of the seized property at the time of the contested search and seizure. Neither could Garrett avail himself of the alternative requisite for standing ennunciated in *Jones* -- legitimate presence on the premises at the time of the search. The Court noted that in cases such as *Simmons* a defendant's testimony at a motion to suppress evidence may be needed to establish standing. If such testimony, which "must often be highly prejudicial to a defendant,"[2] were admissible against defendant at his later trial, defendant would be faced with the same type of dilemma the Court found intolerable in *Jones v. United States, supra.*

The resolution of the *Simmons* Court to the standing dilemma there was radically different from that of the *Jones* Court. Where the *Jones* Court completely relieved defendants charged with "possessory" crimes of the burden of alleging any facts to establish standing, the *Simmons* Court held that:

> . . . when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.

Simmons v. United States, supra, 390 *U.S.* at 394. Thus this Court in *Simmons* resolved the "conflict" between the Fourth Amendment standing requirements and the Fifth Amendment privilege against self-incrimination not by granting defendants "automatic" standing as was done in *Jones,* but by requiring the defendant to establish his standing and then prohibiting the prosecution from using at trial (on the issue of guilt) any incriminating testimony given by the defendant in support of a motion to suppress evidence. Moreover, the *Simmons* rule applies

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2 *Simmons v. United States, supra,* 390 *U.S.* at 391.

to defendants charged with "possessory" as well as "non-possessory" crimes. Since the *Simmons* case was decided then, no defendant has ever been faced with the *Jones* "dilemma," for the reason that *Simmons* effectively removed one of the horns of that "dilemma." The State submits that there is no longer a need to grant a defendant *Jones'* "automatic" standing. In light of *Simmons* a defendant who wishes to challenge the legality of a search and seizure should be required to allege, and if disputed, establish, the requisite interest in either the premises searched or the property seized. Since any testimony given by a defendant at a motion to suppress may not be admitted against him at trial on the issue of guilt, there is no infringement on his Fifth Amendment privilege against self-incrimination. The reason for the "automatic" standing rule having been obviated in *Simmons v. United States, supra,* the rule itself is now obsolete. This Court recently noted as much in *Brown v. United States,* 411 *U.S.* 223 (1973), where it observed:

> The self-incrimination dilemma, so central to the *Jones* decision, can no longer occur under the prevailing interpretation of the Constitution. Subsequent to *Jones*, in *Simmons v. United States, supra,* we held that a prosecutor may not use against a defendant at trial any testimony given by that defendant at a pretrial hearing to establish standing to move to suppress evidence. *Id.* 411 *U.S.* at 228, 36 *L.Ed. 2d* at 213.

Several lower federal courts have reasoned similarly. See *United States v. Cotham,* 363 *F.Supp.* 851 (W.D. Tex. 1973) where the District Court stated:

> Even if the facts of this case were such as to bring it within the *Jones* rule, this Court would be very reluctant to acknowledge automatic standing, in light of the Supreme Court's statements in *Brown* concerning the effect of *Simmons v. United States, supra,* upon the necessity for the rule in *Jones. There no longer being a reason for the rule, this Court can perceive no reason for applying it. Id.* at 854. (Emphasis added).

And see *United States v. Dye,* ___ *F. 2d* ___ . 15 *Crim. Law Rpts.* 2541 (6th Cir. August 22, 1974) where the Court of Appeals noted:

> The dilemma referred to in *Jones* of requiring one to admit possession and, thus incriminate himself, in order to establish standing, was removed by the holding in *Simmons v. United States*, 390 U.S. 377 (1968).
>
> * * *
>
> In *Brown v. United States*, 411 U.S. 223, 13 *Crim. L.* 3023, the Supreme Court did not reach the question of whether the *Simmons* rule make the "automatic" standing doctrine of *Jones* unnecessary.

The State is prejudiced in a very real way by the "automatic" standing rule of *Jones*. Under that rule a defendant need not come forward at a motion to suppress evidence and assert any proprietary, possessory or participatory interest in either the premises searched or the property seized, regardless of the fact that he may well have such an interest. Then at trial the defendant may take the stand and deny any such interest in either the property seized or the premises searched. Had the defendant been required to assert at the motion to suppress evidence such an interest, he would be precluded from perjuring himself at the trial by taking the witness stand and denying the interest he had formerly asserted. For the *Simmons* rule only prohibits the admission at trial of the testimony of defendant given at a motion to suppress evidence *on the issue of guilt*. Prior inconsistent statements made under oath at the motion to suppress evidence, which statements were in no sense coerced or involuntary, would be admissible at trial on the issue of defendant's credibility. See *Harris v. New York*, 401 U.S. 22, 224, (1971), where this Court quoted from *Walder v. United States*, 347 U.S. 62, 65 (1954) as follows:

> It is one thing to say that the government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment.

> There is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the government's disability to challenge his credibility.

The combined effect then of the *Jones* "automatic" standing rule and the *Simmons* rule is to allow many defendants at trial to falsely deny from the witness stand any proprietary, possessory or participatory interest in the premises searched or the property seized. The State submits that this Court should not countenanace the perpetration of such a fraud upon our system of criminal justice.

In the instant case the search of room 265 of the Howard Johnson Motel which uncovered the narcotics took place at 11:15 A.M. on September 15, 1971. The transcript of the motion to suppress indicates that neither defendant was present at the time of this search since each had been arrested several hours earlier (1T48-21 to 24). Moreover, any interest on the part of either defendant in room 265, legitimate or otherwise, had clearly terminated at the time of the arrests. And neither defendant alleged at the motion to suppress evidence any interest whatsoever in the narcotics seized. The State submits that where, as here, a defendant is not present at the time of the search, and has no legitimate proprietary, possessory or participatory interest in either the premises searched or the property seized, he lacks standing to challenge the legality of the search and seizure.

POINT II

Defendants Lack Standing To Challenge The Legality Of The Searches And Seizures Of The Firearms Because They Did Not Allege Any Interest In The Firearms Seized And They Did Not Establish Any Legitimate Proprietary, Possessory Or Participatory Interest In The Premises Searched.

In *Jones v. United States, supra,* 362 *U.S.* at 263, 265-267, this Court in an alternative basis for its holding enunciated another test for standing to challenge the legality of a search and seizure:

> . . . anyone *legitimately* on the premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. *This would of course not avail*

those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched. (Emphasis added). *Id* 362 *U.S.* at 267.

At the motion to suppress evidence neither defendant asserted any proprietary, possessory or participatory interest in the firearms seized. Both defendants did, however assert through testimony that they had a legitimate proprietary and possessory interest in the motel rooms searched. And it is uncontroverted that each defendant was present in the respective motel rooms at the times of the seizures of the firearms. At the motion to suppress evidence the State contended that the defendants lacked standing because they could establish no *legitimate* proprietary, possessory or participatory interest in the premises searched.

The State submits that the defendants failed to meet their burden of establishing standing.

Defendants' presence in the motel rooms at the times of the searches was not legitimate. They were there for the illegitimate purpose of participating in an illegal narcotics transaction. In *Brown v. United States, supra,* 411 *U.S.* at 230, n. 4, this Court shed some light on the meaning of the term "legitimate" interest in the property seized. The petitioners in that case contended before this Court that they had a ". . . 'property interest' in or 'constructive possession' of the stolen goods . . . ." The Court responded that in any event petitioners' "'property interest' in the merchandise was *totally illegitimate.*" (Emphasis added). *Id.* Thus, this Court indicated that the legality of a defendant's interest in the seized property has a bearing on the *legitimacy* of his interest in that property for the purpose of standing. The same reasoning applies to the legitimacy of defendant's presence at the time of a search: if he is present for an unlawful purpose (as defendants here were) his presence is not legitimate.

The legitimacy of defendants' presence is also undercut for an entirely different reason. At the motion to suppress hearing, both defendants took the stand. They both testified that they were present in their respective hotel rooms when the firearms were seized. They attempted to establish their standing to challenge the legality of those seizures by explaining that the rooms in question had been rented by their "agents." The facts relevant to that claim are set forth in the Statement of the Case.

The rooms were rented in the names of so-called "agents." Except for defendant Sheffield's testimony that "agent" Bryant

occupied one motel room for 15 minutes when he gave Sheffield the key, there is no testimony that the "agents" ever occupied the motel rooms. Neither defendant registered with the motel desk clerk or notified the clerk of his presence. There is no testimony that the defendants did anything to associate themselves with the motel rooms except to occupy them. Thus, it can reasonably be inferred that it was defendants' purpose to occupy the rooms secretly. Except for the actual occupancy, defendants appear to have done everything possible to divorce themselves from any contact or association with the rooms. There was no testimony by the defendants that would lend to their occupancy of the rooms any degree of legitimacy. Defendants did not conduct themselves in a manner reasonably expected of persons legitimately occupying motel rooms. Their conduct was in every material respect illegitimate. To accord the dignity of legitimacy to defendants' secretive conduct would reduce the question of standing to a requirement of *mere presence*. This Court has never held that mere presence on premises clothes that premises with all the accoutrements of a constitutionally protected area.

CONCLUSION

For the foregoing reasons. the State of New Jersey respectfully prays that this petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

Order Of The Supreme Court Of New Jersey

SUPREME COURT OF NEW JERSEY
C-764 SEPTEMBER TERM 1973

State of New Jersey,
Plaintiff-Petitioner,

vs.

David Sheffield and
Chesley Holmes,

ON PETITION FOR CERTIFICATION

Defendants-Respondents.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same.

It is hereupon ORDERED that the petition for certification is denied.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 22nd day of July, 1974.

Clerk

APPENDIX B

Opinion Of The Superior Court Of New Jersey, Appellate Division

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1447-72
A-1492-72

STATE OF NEW JERSEY

Plaintiff-Respondent,

v.

DAVID SHEFFIELD and CHESLEY HOLMES.

Defendants-Appellants.

Argued: January 21, 1974 - Submitted: March 15, 1974 - Decided: March 25, 1974.

Before Judges Collester, Lynch and Michels.

On appeal from the Essex County Court.

Mr. Robert R. Blasi argued the cause for appellants (Messrs. Herrmann and Blasi, Attorneys).

Mr. Robert L. Martin, Assistant Prosecutor, argued the cause for respondent (Mr. Joseph P. Lordi, Essex County Prosecutor, attorney; Mr. Michael H. Stieber, Assistant Prosecutor, of counsel).

PER CURIAM

This is an appeal by defendant Sheffield from a conviction for possession of a dangerous weapon and by defendant Holmes from convictions for conspiring to violate the narcotics laws, possession of a controlled dangerous substance and possession of a dangerous weapon. The trial judge set aside Sheffield's conviction on a charge of conspiracy to violate the narcotics laws as against the weight of evidence and granted a new trial thereon.

On September 15, 1971 at approximately 1:15 a.m., Officer Semplanski and his partner went to the Howard Johnson Motor Lodge on Route 1, Newark. After speaking to the manager and a

female employee they went to Room 354, knocked, and identified themselves as police officers, after which defendant Sheffield opened the door. Upon entering, Semplanski looked under a table to his left and observed a gun. The occupants of the room, Sheffield and Elizabeth Cantrell, were placed under arrest.

At approximately 3 or 4 a.m. on September 15, 1971 Patrolman Fenton responded to a call from the Howard Johnson Motor Lodge concerning a man in possession of a weapon in Room 265. Fenton and his partner knocked on the door of that room which was opened by defendant Holmes. As the door was opened, Fenton observed a gun on the dressing table. Holmes was arrested and a search of the room was made. It revealed a paper bag containing $8,962 in cash. The acting manager of the motel testified that on the day in question he was instructed by the police to double-lock the doors of Rooms 265 and 354 with the grand master key. He reopened the door when Detective Rosamelia arrived at approximately 11:15 a.m. on the same day. The acting manager let the police into Room 265, the room in which Holmes had been arrested. There a bag of a white powdery substance was found under a waste paper basket in the bathroom. It was brought to the police station. While neither Room 265 nor 354 was rented in the names of defendants, they were rented for them by associates of theirs, Anthony Johnson and John Bryant.

At the trial both defendants moved to suppress the evidence obtained as a result of the searches. The trial judge denied the motions on the ground that defendants had no standing because they were not the registered occupants of the rooms. Said ruling is urged as one of the grounds for reversal.

We shall consider the issues raised by defendants *seriatim*.

I.

The standing of defendants to move to suppress the evidence seized.

The trial court held that, since defendants did not rent the rooms in the motel in their own names, they did not have sufficient proprietary or possessory interest to establish standing to make the motion to suppress. The court's reasoning was that the search was directed against rooms rented by Johnson and Bryant and: "As such the search having been directed against those who had been the registered occupants of the rooms, these particular defendants have no standing." In support of its ruling the court

cited *Jones v. United States*, 362 *U.S.* 257,261 (1960).

The trial court's reliance on *Jones* was misplaced. There defendant was charged in a two count indictment. In the first count he was charged with having "purchased, sold, dispensed and distributed" narcotics in violation of 26 *U.S.C.* § 4704(a). In the second count he was charged under 21 *U.S.C.* § 174 with having "facilitated the concealment and sale of" the same narcotics knowing them to have been imported illegally into the United States. As the Supreme Court said in *Jones:* "Possession was the basis of the Government's case against petitioner." 362 *U.S.* at 258. Jones was arrested in an apartment of a friend, who had given him the use of it, by federal officers who were executing a search warrant. The officers seized narcotics and narcotic paraphernalia. Defendant admitted that some of them were his and that he was living in the apartment. He moved to suppress the evidence on the ground that the warrant had been issued without a showing of probable cause. The Government challenged defendant's standing because he "alleged neither ownership of the seized articles nor an interest in the apartment greater than that of an 'invitee or guest'." The Supreme Court held that possession of the narcotics, on the basis of which defendant was to be convicted, sufficed to give standing to move to suppress to one so charged "under any fair and rational conception of Rule 41(e)" (of the Federal Rules of Criminal Procedure).

The court, speaking through Mr. Justice Frankfurter, then looked to defendant's status as "invitee or guest" in the apartment. After reviewing several lower court decisions which had denied standing to one so situated, it rejected them and concluded:

> No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched. As petitioner's testimony established Evans' consent to his presence in the apartment, he was entitled to have the merits of his motion to suppress adjudicated.

Jones was approved in our State in *State v. Parsons*, 83 *N.J. Super.* 430, 443 (App. Div. 1964), in the following terms:

> The State cites *State v. Bibbo*, 83 *N.J. Super.* 36 (*App. Div.* 1964), to support its position that defendant lacks standing to object to the search because the vehicle was "neither in his possession nor was it under his ownership." That opinion recognizes that a guest in the place searched has status to object (83 *N.J. Super.* at *p.* 38). Parsons was at least a guest. In fact, he testified that he and Wilds used the car interchangeably. But in our view the matter of defendant's standing here is controlled by *Jones v. United States*, 362 *U.S.* 257, 80 *S.Ct.* 725, 4 *L.Ed. 2d* 697 (1960), a decision which designedly liberalized the law with respect to the position of those claiming to be aggrieved by an illegal search although only incidentally present in the place searched.
>
> In *Jones* it was held that a guest in an apartment present when a successful search for narcotics occurred had status to attack the search when he was subsequently indicted for possession of the narcotics found there. The court held (362 *U.S.*, at *p.* 267, 80 *S.Ct.*, at *p.* 734, 4 *L.Ed.2d* 697): "*** anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." The standard set forth in this holding is met in the instant case. Defendant was "legitimately" in the car (*vis a vis* Wilds) at the time it was searched by the state troopers, and the fruits of the search thereof were used to secure the convictions appealed from in respect of two of the counts of the indictment. *Cf. State v. Taylor*, 81 *N.J. Super.* 296 (*App. Div.* 1963). In *Jones, supra* (362 *U.S.*, at *pp.* 266-267, 80 *S.Ct.* 725, 4 *L.Ed. 2d* 697), the court expressly rejected the test proposed by the State here, that based on "possession" or "ownership."

So here defendants were "legitimately" in the motel room when it was searched.

Accordingly, we hold that the trial court erred in ruling that defendants Sheffield and Holmes did not have standing to make the motion to suppress.

II.

Admission of the hearsay testimony of Officer Semplanski that Gail Fitzgerald, in the presence of defendant Sheffield and of Betty Cantrell, told him that she had seen defendant Sheffield with a weapon in his hands.

As the State concedes, the admission of this hearsay testimony was erroneous. The basic reason why that is so is that, in that state of the record, defendant Sheffield was deprived of the right of cross-examination of the witness Gail Fitzgerald. The prosecutor represented that she would be produced as a witness. She was not. However, the error was harmless. Betty Cantrell did appear as a witness and testified that defendant Sheffield admitted the gun was his, and she and Sheffield were the only occupants of the room in which the gun was found.

III.

Comments by the Prosecutor on the failure of defendant Holmes to take the stand.

The comment of the prosecutor in this respect was in response to defendant counsel's summation wherein he said:

> I say I'm trying to speak on behalf of poor Mr. Holmes here, Chesley, who can't speak and he's engaged me to speak for him. When I use the word "I," I'm speaking for Chesley.

This was practically an invitation to the prosecutor to explain (*Babb v. United States,* 351 *F.2d* 863, 868 (8th Cir. 1965)) as he did, that "*** absolutely no one preventing *[sic]* Mr. Holmes from speaking. If he wanted to, he could have. So don't be fooled again. No one is restraining him from speaking." See *State v. Fioravanti,* 46 *N.J.* 109 (1965), *cert.* den. 384 *U.S.* 919 (1969), and *State v. Schultz,* 46 *N.J.* 154 (1966), *cert.* den. 384 *U.S.* 918. We find no prejudicial error in the prosecutor's remarks.

IV.

The contention that a motel room is not a "public place" and therefore there is no violation of N.J.S.A. 2A:151-41.

State v. Johnson, 125 *N.J. Super.* 344 (App. Div. 1973), holds that the statute is violated whether the place of possession is public or private. No error.

V.

The testimony of Detective Monahan that the amount of heroin found would make 20,560 decks of heroin which, at street trade, would produce $132,078.

Defendants contend that this evidence served only to inflame the jury. Since the charges here included one of conspiracy to violate the narcotic laws, on that issue the evidence was relevant. All relevant evidence is admissible, unless otherwise provided. *New Jersey Rules of Evidence*, rule 7(f). There is no contrary provision applicable here. The cited evidence is admissible.

CONCLUSION

The matter is remanded for hearing of defendants' motions for suppression of the evidence seized in the motel room. If the motion is granted, the conviction is reversed and a new trial ordered. If it is denied, the conviction will be affirmed. We do not retain jurisdiction.

APPENDIX C

Orders Of The Essex County Court, Criminal Division

THE STATE OF NEW JERSEY
vs.
CHESLEY HOLMES

ESSEX COUNTY COURT
CRIMINAL DIVISION

INDICTMENT 258-71
ACCUSATION
COMPLAINT
ORDER

On motion (to suppress evidence)

The Court having considered the testimony presented and arguments of counsel for the State and counsel for the defendant, and good cause having been shown:

It is on this 4 day of December 1972, ORDERED that the Motion (to Suppress Evidence) (to Reduce Sentence) be and the same is hereby DENIED x GRANTED

J. S. C.

Consented to as to form

Joseph P. Lordi
Prosecutor of Essex County

Attorney for Defendant

Original to be filed with Court Clerk's Office

Copy to: Prosecutor's Office
Attorney for the defendant
Municipal Court (on Motion to Suppress on Complaint

THE STATE OF NEW JERSEY vs. Chesley Holmes	ESSEX COUNTY COURT CRIMINAL DIVISION INDICTMENT 259-71 ACCUSATION COMPLAINT ORDER

On motion (to suppress evidence) :

The Court having considered the testimony presented and arguments of counsel for the State and counsel for the defendant, and good cause having been shown:

It is on this 4 day of December 1972, ORDERED that the Motion (to Suppress Evidence) be and the same is hereby

DENIED x GRANTED ___

_____
J.S.C.

Consented to as to form

_____
Joseph P. Lordi
Prosecutor of Essex County

_____
Attorney for Defendant

Original to be filed with Court Clerk's Office
Copy to: Prosecutor's Office
Attorney for the defendant
Municipal Court (on Motion to Suppress on Complaint)

THE STATE OF NEW JERSEY
vs.
David L. Sheffield

ESSEX COUNTY COURT
CRIMINAL DIVISION

INDICTMENT 284-71
ACCUSATION
COMPLAINT
ORDER

On motion (to suppress evidence) :

The Court having considered the testimony presented and arguments of counsel for the State and counsel for the defendant, and good cause having been shown:

It is on this 4 day of December 1972, ORDERED that the Motion (to Suppress Evidence) be and the same is hereby

DENIED x GRANTED ____

_____
J. S. C.

Consented to as to form

_____
Joseph P. Lordi
Prosecutor of Essex County

_____
Attorney for Defendant

Original to be filed with Court Clerk's Office
Copy to: Prosecutor's Office
Attorney for the defendant
Municipal Court (on Motion to Suppress on Complaint)

THE STATE OF NEW JERSEY
vs.
Chesley Holmes
David L. Sheffield

ESSEX COUNTY COURT
CRIMINAL DIVISION

INDICTMENT 3678-71
ACCUSATION
COMPLAINT
ORDER

On motion (to suppress evidence) :

The Court having considered the testimony presented and arguments of counsel for the State and counsel for the defendant, and good cause having been shown:

It is on this 4 day of December 1972, ORDERED that the Motion (to Suppress Evidence) be and the same is hereby

DENIDE x GRANTED

J. S. C.

Consented to as to form

Joseph P. Lordi
Proseutor of Essex County

Attorney for Defendant Sheffield

Original to be filed with Court Clerk's Office
Copy to: Prosecutor's Office
Attorney for the defendant
Municipal Court (on Motion to Suppress on Complaint)

APPENDIX D

Relevant New Jersey Statutes

ARTICLE 5. CARRYING CONCEALED WEAPONS

2A:151-42. Carrying weapons without permit or identification card; penalty

Except as hereinafter provided, any person who carries, holds or possesses in any automobile, carriage, motor cycle or other vehicle, or on or about his clothes or person, or otherwise in his possession, or in his possession or under his control in any public place or public area:

a. A pistol or revolver without first having obtained a permit to carry the same in accordance with the provisions of this chapter; or

b. A rifle or shotgun without first having obtained a firearms purchaser identification card in accordance with the provisions of this chapter; or

c. Any dangerous instrument of the kinds known as a blackjack, slung shot, billy, sandclub, sandbag, bludgeon, metal knuckles, cestus or similar leather band studded with metal for fitting on the knuckles, loose wool impregnated with metal filings, or razor blades imbedded in wood slivers, dagger, dirk, dangerous knife or knife as defined in chapter 5 of the laws of 1952 (C.2A:151-62), stiletto, grenade, bomb or other explosive, other than fixed ammunition, except as such person may be licensed to carry, hold or possess explosives under the provisions of Title 21 of the Revised Statutes[1] and amendments thereto, is guilty of a high misdemeanor.

Amended by L.1960, c. 26, p. 87, § 1; L.1966, c. 60, § 32; L.1968, c 307, § 1, eff. Sept. 26, 1968.

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1 Section 21:1-1 et seq.

24:21-20. Prohibited acts B.—Possession, use or being under influence—Penalties

a. It is unlawful for any person, knowingly or intentionally, to obtain, or to possess, actually or constructively, a controlled dangerous substance unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this act. Any person who violates this section with respect to:

(1) A substance classified in Schedule I or II[1] which is a narcotic drug and any other controlled dangerous substance classified in Schedule I, II, III, *or* IV[2] is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 5 years, a fine of not more than $15,000.00, or both, except as provided in subsection a. (3) below;

(2) Any controlled dangerous substance classified in Schedule V[3] is guilty of a misdemeanor and shall be punished by imprisonment of not more than 1 year, a fine of not more than $5,000.00, or both; or

(3) Possession of more than 25 grams of marihuana, *including any adulterants or dilutents,* or more than 5 grams of hashish is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 5 years, a fine of not more than $15,000.00, or both; provided, however, that any person who violates this section with respect to 25 grams or less of marihuana, *including any adulterants or dilutents,* or 5 grams or less of hashish is a disorderly person.

b. Any person who uses or who is under the influence of any controlled dangerous substance, as defined in this act, for a purpose other than the treatment of sickness or injury as prescribed or administered by a person duly authorized by law to treat sick and injured human beings, is a disorderly person.

In a prosecution under this subsection, it shall not be necessary for the State to prove that the accused did use or was under the influence of any specific narcotic drug or drugs, but it shall be sufficient for a conviction under this subsection for the State to prove that the accused did use or was under the influence of some controlled dangerous substance or counterfeit controlled dangerous substance as defined in this act, by providing that the accused did manifest physical and physiolog-

ical symptoms or reactions caused by the use of any controlled dangerous substance.

c. In addition to the general penalty prescribed for a disorderly person's offense pursuant to N.J.S. 2A:169-1, every person adjudged a disorderly person for a violation of this subsection shall, at the discretion of the sentencing judge, forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of not more than 2 years from the date of his conviction and until such privilege shall be restored to him by the Director of Motor Vehicles upon application to and after certification by a physician to the director that such person is not a drug dependent person within the meaning of this act. The court before whom any person is convicted of a violation of this section shall cause a report of such conviction to be filed with the Director of Motor Vehicles.

L.1971, c.226, § 20. Amended by L.1971, c. 3, § 9; L.1971, c. 367, § 3, eff. Dec. 28, 1971

24:21-24. Attempt, endeavor and conspiracy

a. Any person who attempts, endeavors or conspires to commit any *offense defined in this act is punishable by imprisonment or fine or both* which may *not exceed the maximum punishment prescribed for the offennse,* the commission of *which was the object of the endeavor of conspiracy.*

b. Information communicated to a practitioner in an effort unlawfully to obtain or procure the administration of a controlled dangerous substance shall not be a privileged communication.

L1970, c. 226, § 24.

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1 Sections 24:21-5, 24:21-6

2 Sections 24:21-5 to 24:21-8

3 Sections 24:21-8.1.